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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PETER T. HARRELL,

Plaintiff,

No. CIV S-05-0420 GEB CMK

vs.

DARREL LEMOS, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

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Mr. Harrell, who is proceeding without counsel and in forma pauperis, has filed this civil rights action against defendants. He alleges various federal civil rights and state law violations stemming from a September 22, 2003 arrest. By order filed October 30, 2006, the court granted plaintiff leave to file an amended complaint which alleged that the criminal charges pending against as a result of the September 22, 2003 arrest had been dropped or otherwise resolved in his favor. For reasons more fully explained below, the court finds that dismissal based on Heck v. Humphrey, 512 U.S. 477 (1994) is appropriate.

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1 Pursuant to 28 U.S.C. § 1915(e)(2), the court is directed to dismiss the case at any  
2 time if the action is frivolous or malicious, fails to state a claim on which relief may be granted.  
3 In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for  
4 other harm caused by actions whose unlawfulness would render a conviction or sentence invalid,  
5 a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,  
6 expunged by executive order, declared invalid by a state tribunal authorized to make such a  
7 decision, or called into question by a federal court's issuance of a writ of habeas corpus. See  
8 Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). A claim for damages bearing that relationship  
9 to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

10 Here, plaintiff's amended complaint alleges that "the criminal charges arising  
11 from the incident on September 22, 2003, were dismissed on January 7, 2004..." (Doc. 47 at  
12 3:19-21; 6:13-15." Although these statements indicate that all charges pending against plaintiff  
13 as a result of the September 2003 incident had been dismissed, plaintiff had previously advised  
14 the court otherwise.<sup>1</sup> Specifically, at a hearing on this matter on October 26, 2006, both plaintiff  
15 and defendant's counsel agreed that criminal charges stemming from the September 22, 2003  
16 arrest are currently pending against plaintiff.<sup>2</sup> Further, on November 22, 2006, defendants filed  
17 a motion requesting that the court take judicial notice of Siskiyou County Superior Court records  
18 which show that there is a pending criminal action against plaintiff stemming from the  
19 September 2003 violation. (Doc. 52.) Pursuant to Federal Rule of Evidence 201, the court  
20 takes judicial notice of these records. Fed. R. Evid. 201. A check of the Siskiyou County  
21 Superior Court's online records reveals that charges stemming from the September 2003  
22 violation were filed against plaintiff in January 2006 and are still pending. See

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23 <sup>1</sup>By separate order, the court has addressed plaintiff's misrepresentations to the court.  
24 (Doc. 56.)

25 <sup>2</sup>At the time this action was opened, the charges stemming from the arrest had been  
26 dismissed; however, it appears they were re-filed in January 2006, during the pendency of this  
action.

1 www.siskiyou.courts.ca.gov.

2 Because plaintiff cannot establish that any pending criminal charges, conviction  
3 or sentence stemming from the September 2003 arrest have been dismissed, reversed, expunged,  
4 declared invalid or called into question by a federal court's issuance of a writ of habeas corpus,  
5 the court finds that plaintiff's complaint fails to state a cognizable claim for relief. See Heck v.  
6 Humphrey, 512 U.S. 477, 486-87 (1994). The court notes that, in his response to the court's  
7 order to show cause, plaintiff urges the court to stay this action pending the outcome of the  
8 criminal proceedings against him. However, Heck v. Humphrey, 512 U.S. 477 (1994) bars this  
9 course of action. Id. (stating that the § 1983 claim does not accrue until the plaintiff has  
10 somehow invalidated the conviction, sentence, or fact of imprisonment).

11 Plaintiff further states that dismissal of this action would be a windfall to  
12 defendants, effectively barring his cause of action because the statute of limitations for his claim  
13 has already run. The court is not persuaded by this argument. There are tolling provisions in  
14 place which may defeat any statute of limitations arguments. This, however, is a problem for  
15 another day. What is clear now is that plaintiff does not have a cause of action because his §  
16 1983 claim cannot accrue until he has somehow invalidated the criminal charges stemming from  
17 his September 2003 arrest which are currently pending against him. See Heck v. Humphrey, 512  
18 U.S. 477, 486-87 (1994).

19 Accordingly, the court recommends that this action be dismissed for failure to  
20 state a cognizable civil rights claim. In light of the court's finding that plaintiff fails to state a  
21 cognizable federal civil rights claim, the court will recommend that the district court decline to  
22 exercise jurisdiction over plaintiff's state claims. See 28 U.S.C. § 1367(c). Therefore, the court  
23 recommends that plaintiff's complaint be dismissed in its entirety.

24 Also pending before the court are defendants' September 5, 2006 and November  
25 22, 2006 motions to dismiss plaintiff's complaint. In light of the recommendation that plaintiff's  
26 complaint be dismissed for failure to state a claim, the court finds that the motions to dismiss are

1 moot.


2 Based on the foregoing, IT IS RECOMMENDED that:

3 1. Plaintiff's second amended complaint be dismissed for failure to state a claim  
4 upon which relief can be granted.

5 2. Defendants' motions to dismiss (docs. 35 and 50) are rendered moot by the  
6 dismissal of the complaint in this action.

7 These findings and recommendations are submitted to the United States District  
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days  
9 after being served with these findings and recommendations, either party may file written  
10 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
11 Findings and Recommendations." The parties are advised that failure to file objections within  
12 the specified time may waive the right to appeal the District Court's order. See Martinez v. Ylst,  
13 951 F.2d 1153 (9th Cir. 1991).

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15 DATED: November 30, 2006.

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18 **CRAIG M. KELLISON**  
19 UNITED STATES MAGISTRATE JUDGE  
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